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No. 92-352

U.S.
1992
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In The

Supreme Court of the United States

October Term, 1992

JASON W. NOVAK,

Petitioner,

v.

ANDERSEN CORPORATION, A MINNESOTA CORPORATION, AND ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

G. A. HOEL, JOHN VICTOR JENSEN, M. O. JOHNSON, L. W. KEDROWSKI, H. C. MEISSNER, G. SCHNEIDER, W. A. WELLMAN, INDIVIDUALLY, AND AS TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST,

and

JOHN DOE AND RICHARD ROE AND OTHER TRUSTEES, PLAN ADMINISTRATORS AND COMMITTEE MEMBERS OF THE ANDERSEN CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN AND TRUST, WHOSE IDENTITIES ARE UNKNOWN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. WHETHER A PERSON WHO HAS RECEIVED ALL THE BENEFITS TO WHICH HE IS ENTITLED UNDER AN ERISA PLAN MAY RECOVER MONETARY DAMAGES AS "OTHER APPROPRIATE EQUITABLE RELIEF" UNDER § 502(A)(3) OF ERISA.

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On Petition For A Writ Of Certiorari
To The United States Court Of appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 962 F.2d 757. The opinion of the district court has not been reported.

STATEMENT OF THE CASE

Petitioner, Jason W. Novak, ("Novak") voluntarily terminated his employment at Andersen Corporation[1] on June 26, 1987. At the time, Novak had an account in the Andersen Corporation Employee Stock Ownership Plan (the "Plan"), which is an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). Novak asked for and received a lump sum distribution of his entire account under the Plan.

After having received this complete distribution of his monetary benefits under the Plan, Novak commenced this action to recover monetary damages for taxes he paid with respect to the distribution he received. Novak contended that Respondents violated the Plan by failing to

[1] Pursuant to Rule 29.1 of the United States Supreme Court Rules, Andersen Corporation, which is not publicly traded, has no parent company and no non-wholly owned subsidiaries.

provide him with a written explanation of a rollover option under Internal Revenue Code § 402(f). The rollover notice required by Internal Revenue Code § 402(f) is nowhere required by ERISA. The administrators of the Plan, pursuant to discretionary authority given to them by the terms of the Plan, interpreted the Plan not to require distribution of this notice. Respondents, therefore, denied that there was a Plan violation and also alleged that oral notice of the rollover option was provided to Novak.

Respondents moved for summary judgment on two grounds: (1) that Novak's claim was precluded as a matter of law because the monetary damages sought did not constitute "other appropriate equitable relief" within the meaning of ERISA § 502(a)(3); and (2) that the Plan administrators properly interpreted the Plan and therefore no Plan violation had occurred. The District Court granted the motion for summary judgment on the first ground, without reaching the issue of whether the Plan required the notice. The Eighth Circuit affirmed that grant of summary judgment, also without reaching the issue of whether the Plan required the notice. Petitioner sought a rehearing en banc in the Eighth Circuit, but did not seek a rehearing by the original panel.[2] Petitioner then filed this petition for writ of certiorari.

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[2] It is questionable whether this petition is even timely. Under Rule 13.4 of the Supreme Court Rules a suggestion for rehearing in banc does not change the time for filing a Petition for Writ of Certiorari. Petitioners filed a "Petition for Rehearing En Banc" which asked only for an en banc rehearing. This Petition for Writ of Certiorari was filed more than 90 days after the judgment on appeal and therefore appears not to be timely under Rule 13.4.

REASONS FOR DENYING WRIT

I. THE EIGHTH CIRCUIT CORRECTLY INTERPRETED ERISA CONSISTENTLY WITH THE OTHER CIRCUITS.

A. The Eighth Circuit's Opinion Correctly Interprets ERISA.

Petitioner primarily supports his Petition for a Writ of Certiorari with arguments going to the merits of the legal issue presented. Apart from the fact that such merits arguments do not permit the issue to rise to the level where certiorari is appropriate, petitioner's merits arguments are clearly erroneous. Novak's position is tantamount to asking that the carefully drafted ERISA statute be rewritten. Plainly, monetary damages cannot constitute "equitable relief" under Section 502(a)(3) of ERISA as monetary damages constitute legal, not equitable, relief. Having drafted a comprehensive statute with carefully crafted remedy provisions, Congress was obviously mindful of the distinction between legal relief and equitable relief. After analyzing the remedies available under ERISA, together with the legislative history, the Eighth Circuit properly concluded that petitioner's argument constituted an invitation to rewrite the statute by stating "We are not inclined to legislate by adding monetary damages to this already complete list." *Novak v. Andersen Corp.*, 962 F.2d 757, 760 (8th Cir. 1992). Moreover, petitioner's merits arguments are inconsistent with the great weight of authority of the other circuits. Finally, petitioner's reliance upon the labels "contractual" and "extra-contractual" do not advance the merits of his position.

The key word in ERISA § 502(a)(3) is "equitable"; the word "legal" is noticeably absent. Underscoring that

Congress was mindful of the distinction between equitable and legal relief is the fact that the Senate version of the ERISA bill originally contained a section which provided for "civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation or duty of a fiduciary." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 146 n.14 (1985) (*quoting* H.R. 2, § 693, 93d Cong., 2d Sess. (Mar. 4, 1974, 3 Leg. Hist. 3816)). The Supreme Court in *Russell* further noted that "[i]n the bill passed by the House of Representatives, and ultimately by the Conference Committee, the reference to legal relief was deleted." 473 U.S. at 146.

Moreover, in another section of ERISA, Congress plainly provided for legal relief. In § 502(g)(2), ERISA provides for "such other legal or equitable relief as the Court deems appropriate" when a fiduciary sues an employer to force the employer to make required contributions to the Plan. Unquestionably, in drafting ERISA, Congress understood the traditional distinction between legal and equitable relief, and it provided the relief it deemed appropriate in each section of the statute.

Significantly, remedies are very comprehensively addressed in ERISA § 502. Congress drafted ERISA as a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). As part of that statute, Congress drafted an "interlocking, interrelated and interdependent remedial scheme." *Russell*, 473 U.S. at 146. The comprehensive remedies provided in § 502(a), which were obviously crafted with care, strongly suggest that remedies not

expressly provided for were not intended. As stated by Justice Stevens in *Russell, Id.* at 146:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.

Petitioner's attempt to obtain money damages under the words "equitable relief" is clearly contrary to this interlocking, interrelated and interdependent remedial scheme.

In addition to being contrary to the statutory language, petitioner's argument on the merits is contrary to overwhelming judicial precedent. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), this Court held that monetary damages were unavailable under ERISA §§ 409 and 502(a)(2). The language contained in ERISA § 502(a)(3) is no broader than the sections of ERISA construed in *Russell*. Moreover, every circuit that has addressed the issue has held that monetary damages are unavailable under ERISA § 502(a)(3) and in only one case have such damages ever been upheld. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Sommers Drug Stores Co. v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821 (1st Cir. 1988), *cert.*

denied, 488 U.S. 409 (1988). As the Court of Appeals for the Ninth Circuit has succinctly stated, "it appears that Congress used the word 'equitable' to mean what it usually means – injunctive or declaratory relief." *Sokol v. Bernstein*, 803 F.2d at 538.

Petitioner relies substantially upon an argument that his alleged damages are "contractual" as opposed to "extra-contractual" and the reasoning of the Sixth Circuit in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 2256 (1991). However, having received all of the monetary benefits to which he was entitled under the Plan, petitioner's claim actually is for consequential damages from an alleged breach of contract. More significantly, as correctly determined by the Eighth Circuit, the fundamental issue is not which label, contractual or extra-contractual, best fits Novak's alleged damages, but rather whether these monetary damages qualify as "equitable relief" under ERISA § 502(a)(3). Plainly, such monetary damages do not constitute equitable relief.

Furthermore, even assuming that the labels contractual and extra-contractual have some marginal relevance, appellant has misapplied the labels to his alleged damages. In *Russell, supra*, this Court discussed the terms contractual and extra-contractual in terms of distinguishing claims for contractually defined benefits from other claims. In writing for the majority, Justice Stevens stated:

> In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence – in the statute itself and in its legislative history – of any reference to

> an intention to authorize the recovery of extra-contractual damages.

473 U.S. at 148 (footnotes omitted). Thus, even utilizing petitioner's labels, the line between contractual and extra-contractual distinguishes between benefits which are contractually due under the Plan and those which are not. While a tax advantage might be a favorable consequence of receiving a contractually defined benefit, a tax advantage is not contractual unless expressly provided for by the terms of the Plan. *See also* Robertson, Closing the *Massachusetts Mutual v. Russell* Gap: Monetary Damage Awards under ERISA § 502(a)(3), 48 *Washington & Lee L. Rev.* 691, 720 (1991). Finally, damages that go beyond benefits defined by the Plan would not generally be available under the law of trusts. *See Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986); *Restatement (Second) of Trusts* § 205 (1959) (liability for breach of trust is limited to (a) loss in value of trust estate; (b) profits accrued by trustee; or (c) profits lost to an estate). In sum, the damages sought are not recoverable under ERISA § 502(a)(3).

B. There is Not a Material Conflict Between the Circuits Which Requires Supreme Court Resolution.

Petitioner attempts to support his petition on a supposed conflict between an overwhelming number of cases in most circuits, including this case, and a Sixth Circuit case, *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir.

1990), *cert. denied*, 111 S. Ct. 2256 (1991).[3] While the Eighth Circuit declined to follow the Sixth's Circuit's reasoning in this case, the law with respect to the availability of monetary damages under ERISA is clear. Except for a narrow factual situation which is not likely to be repeated, all circuits find that monetary damages are not available under Section 502(a)(3) of ERISA. The *Warren* case is thus an anomaly which has been limited to the Sixth Circuit and to the specific factual situation presented in that case, and is likely tc remain so limited in the future.

Two circuits have had the opportunity to review the reasoning of the *Warren* case since that case was decided. The Seventh Circuit, between the time the Eighth Circuit appeal was argued and the Eighth Circuit rendered its decision in this case, decided a case requiring it to interpret *Warren*. The plaintiffs in that case claimed that since they were seeking financial damages, including increased taxes from a delay in receiving distributions under the Plan, they fit within the *Warren* rule and were entitled to

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[3] This case does not present a direct conflict with *Warren*. As the Eighth Circuit noted, Warren had done all that he could to obtain a tax-deferred distribution and the administrators' failure to follow his instructions caused the loss of tax-deferred status. Here, it was petitioner's failure to deposit his distribution in a proper account which led to the loss of tax deferral. If this case were remanded it would be proved at trial that oral notice was given. Petitioner's damages were thus not reasonably foreseeable nor were they caused by any alleged breach by respondents.

compensatory damages under ERISA. The Seventh Circuit stated "though well-intentioned, we do not find compelling the attempt to distinguish the injuries claimed by Dr. Warren from those alleged by the plaintiff in *Russell*. The *Russell* court made no mention of the 'directness' of the plaintiff's injuries in characterizing her claims as 'extracontractual.' " *Harsch v. Eisenberg*, 956 F.2d 651, 658 (7th Cir. 1992) *petition for cert. filed*, May 11, 1992. The Seventh Circuit thus recognized that the supposed distinction between contractual and extra-contractual damages found by the Sixth Circuit in *Warren* is not consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The Eighth Circuit in this case also followed this Court's *Russell* opinion.

Other courts and commentators have been equally quick to reject the reasoning in *Warren*. *See, e.g.*, Robertson, Closing the *Massachusetts Mutual v. Russell* Gap: Monetary Damage Awards under ERISA § 502(a)(3), 48 *Washington & Lee L. Rev.* 691, 720 (1991); *Oscar A. Samos, M.D. Inc. v. Dean Witter Reynolds Inc.*, 772 F. Supp. 715 (D.R.I. 1991); *Reid v. Gruntal & Co., Inc.*, 763 F. Supp. 672 (D. Me. 1991). In the *Samos* case, one plaintiff, a beneficiary of the employee benefit plan, claimed that he could obtain direct compensatory damages from a fiduciary who allegedly improperly distributed plan proceeds to the beneficiary's wife. The beneficiary claimed that the damages he sought were akin to the damages sought in *Warren*, and not to the emotional distress and punitive damages which had earlier been found by the First Circuit not to be recoverable under § 502(a)(3). The *Samos* court also found that the distinction between contractual

and extra-contractual damages found by the court in *Warren* was not the proper analysis, and that the First Circuit's decision in *Drinkwater v. Metropolitan Life Insurance Company*, 846 F.2d 821, 824-25 (1st Cir.) *cert. denied* 488 U.S. 909 (1988), precluded damages which flowed directly from an alleged breach, as well as emotional distress and punitive damages.

In sum, all courts and commentators other than two of the judges on the *Warren* panel have had no difficulty in determining that monetary damages of all kinds are not allowed under Section 502(a)(3) of ERISA. Before the Sixth Circuit decided the *Warren* case, the First, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits had found that monetary damages were not allowed under § 502(a)(3) of ERISA. *See Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Sommers Drug Store Company v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986), *cert. denied* 479 U.S. 1034 (1987); *Powell v. Chesapeake & Potomac Telephone Company*, 780 F.2d 419 (4th Cir. 1985), *cert. denied* 476 U.S. 1170 (1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Kleinhans v. Lisle Saving Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Drinkwater*. In *Warren*, the Sixth Circuit did not overrule *Varhola*. Even in the Sixth Circuit, then, monetary damages have been upheld only in a very narrow factual situation.

Since the decision in the *Warren* case, the Eleventh Circuit has determined that monetary damages are not available under § 502(a)(3) of ERISA, the Seventh Circuit has confirmed that its earlier decision is still valid after the *Warren* decision, and the Eighth Circuit has, in the case presently before the Court, determined that monetary damages are not available under Section 502(a)(3) of

ERISA. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991); *Harsch*; *Novak*. It is clear that the result in *Warren* is anomalous, and will be limited in the future to the Sixth Circuit and the narrow factual situation in which it arose.

II. SHOULD CERTIORARI BE GRANTED, THIS CASE COULD BE RESOLVED ON GROUNDS SEPARATE FROM THE ALLEGED CONFLICT BETWEEN THE CIRCUITS.

Both before the trial court and the Court of Appeals, respondents relied upon two bases for the dismissal of Novak's claim. The first basis was that monetary damages were not "other appropriate equitable relief" under Section 502(a)(3) of ERISA. It was on this basis that the trial court dismissed Novak's claim and the Eighth Circuit affirmed that dismissal. The second basis was that no violation of the Plan had occurred, so that no remedy was necessary. Neither the District Court nor the Court of Appeals reached the second basis. This Court may affirm the Eighth Circuit, however, on any basis, not simply the basis relied upon by the Eighth Circuit. If certiorari is granted in this case, respondents will properly argue that the Eighth Circuit's decision should be affirmed, not only because it is the correct interpretation of ERISA, but also because the Plan does not require distribution of the notice Novak did not receive.

Contrary to petitioner's interpretation of the Plan, no provision of the Plan expressly requires that a written rollover notice be given to a participant. Petitioner's contention that the Plan requires such notice is based solely

on petitioner's own interpretation, as opposed to that of the Committee, of the language of Section 3.9 of the Plan. Section 3.9 of the Plan states:

> *Reports, Etc.* The committee shall prepare, or cause to be prepared, such reports, disclosures and other filings as are required by law and shall file and distribute the same as so required. Copies of each such report, disclosure and filing shall be submitted to the employer and shall be filed as a part of the permanent records of the committee.

Respondents maintain that the IRS notice is not a report, disclosure or filing within the meaning of the Plan.

The method of interpreting ERISA plans is determined by the plan documents themselves. If the terms of the plan give the plan administrators the authority to interpret plan provisions, then the administrators' interpretation may be set aside only if it is arbitrary and capricious or an abuse of discretion. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989). The Supreme Court noted in *Firestone* that trust law principles apply in determining the standard of review a court should apply to actions of ERISA plan fiduciaries. The governing tenet of trust law applied by the Court was "where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Firestone*, 489 U.S. at 111. The Court held that whether discretion has been conferred upon a plan fiduciary depends upon the language of the plan, but if

such discretion has been conferred, actions of the fiduciary will be reviewed on an arbitrary and capricious or abuse of discretion standard. *Firestone*, 489 U.S. at 111.

The Plan gives the Committee the authority to interpret the Plan. Section 3.4 states:

> *Committee Powers.* The committee shall have the power to make reasonable rules and regulations required in the administration of the plan, to make all determinations which the plan requires for its administration, except those determinations which the plan requires others to make, and *to construe and interpret the plan* whenever necessary to carry out its intent and purpose and to facilitate its administration. Except to the extent inconsistent with law, all such rules, regulations, determinations, constructions and interpretations so made by the committee shall be binding upon all interested parties.

Section 3.4 [emphasis added]. Thus, the administrators in the instant case plainly have discretion to interpret the Plan which can only be disturbed if that discretion is abused.

The administrators of the Plan, pursuant to their authority under Section 3.4 of the Plan, have interpreted Section 3.9 to require only the distribution of reports and notices required by ERISA, not literally *any* report or notice required by *any* law. There are numerous reports required by many laws other than ERISA which affect employees, such as Title VII, OSHA, and the Internal Revenue Code. There are also numerous reports and disclosures required by many laws which do not affect employees. Petitioner urged the lower courts and would

urge this Court to determine that *all* reports required to be distributed by *any* law are incorporated into the Plan by Section 3.9, and that failure to distribute any report can lead to a recovery of monetary damages from the Plan. Clearly, Section 3.9 refers to something less than all laws. The Committee is given the authority to determine what subset of all laws is encompassed by Section 3.9 of the Plan. The Committee reasonably determined that requirements of other statutes and other bodies of law were not meant to be incorporated into the Plan by Section 3.9. It certainly was not an abuse of discretion for the Committee to determine that the ERISA-required reports regarding plan administration and performance were all that were intended to be encompassed by Section 3.9 of the Plan.

The written notice which petitioner did not receive is required by Internal Revenue Code § 402(f). When Congress added this provision to the law it did so in the Internal Revenue Code, seeing this as a tax notice, not an employee benefit notice. Congress had the opportunity to place this notice requirement in ERISA and did not do so. Moreover, ERISA § 502(c) provides penalties for the failure to distribute certain reports required by the Internal Revenue Code. Significantly, the written notice required by § 402(f) of the Internal Revenue Code is not one of the reports for which a penalty is provided. Congress, therefore, when requiring the § 402(f) notice, did not consider the notice sufficiently linked to ERISA to provide a penalty under ERISA for the failure to distribute the notice. The only remedy which Congress provided for the failure to distribute this notice was a $10 fine. It is not an abuse

of discretion for the committee to treat this notice as Congress did, as an IRS notice, not an ERISA notice.

Petitioner did not contend, nor could petitioner contend, that ERISA required the report. Petitioner claimed only that the Plan required distribution of the report. The Plan, however, gives the administrators of the Plan discretion to interpret the Plan. Pursuant to that discretion the administrators of the Plan interpreted the Plan to require the distribution of ERISA required reports and notices and not IRS required reports and notices which are not mentioned in § 502(c) of ERISA. This is a reasonable interpretation of the Plan which was clearly not an abuse of discretion by the administrators of the Plan. Thus, if this Court were to accept certiorari in this case, it may not address the issue presented by petitioner, because the decision of the Eighth Circuit is sustainable on grounds independent of the ground upon which the alleged conflict exists.

CONCLUSION

For these reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: September 23, 1992

Respectfully submitted,

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